

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DALLAS COUNTY HOSPITAL DISTRICT
D/B/A PARKLAND HEALTH & HOSPITAL
SYSTEM. *et al.*;

Plaintiffs,

v.

AMNEAL PHARMACEUTICALS, *et al.*

Defendants.

Case No. 4:19-cv-04834

The Honorable Keith P. Ellison

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE

Defendant CVS Pharmacy, Inc.'s Opposition to Plaintiffs' Motion to Strike for Failure to Disclose Adverse Authority is without merit and, remarkably, does not dispute the fundamental issues presented by Plaintiffs' Motion:

- CVS does not dispute that there is adverse authority (1) directly contrary to CVS's removal, (2) where CVS was a party to case in which the adverse ruling was obtained, and (3) where CVS was represented by the same counsel as this case.
- CVS does not dispute that **every** federal court that has considered CVS's argument has rejected it and found that no federal jurisdiction exists.
- CVS does not dispute that it has an affirmative duty of candor to the tribunal and that it failed to cite this adverse authority in its notice of removal.
- CVS does not dispute that the Court has the inherent authority to craft an appropriate sanction, including striking the notice of removal. *In re: Deepwater Horizon*, 824 F.3d 571, 578 (5th Cir. 2016).¹

¹ CVS also argues that a notice of removal does not qualify as a pleading within the meaning of Rule 12(f). Plaintiffs acknowledge that at least one federal court in Texas has held that a notice of removal is not a pleading for purposes of a motion to strike. *See NexBank, SSB v. Bank Midwest, N.A.*, No. 3:12-CV-1882-D, 2012 WL 4321750, at *2 (N.D. Tex. Sept. 21, 2012). "However, a 'motion to strike' materials that are not part of the pleadings may be regarded as an 'invitation' by the movant 'to consider whether [proffered material] may properly be relied upon.'" *Nat. Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1162 (E.D. Cal. 2008) (quoting *United States v. Crisp*, 190 F.R.D. 546, 551 (E.D. Cal. 1999)). If the Court finds that CVS's notice of removal is not a pleading under Rule 7(a), Plaintiffs

In its Opposition, CVS first argues that it was “not required to delve into authority bearing on Plaintiffs’ jurisdictional arguments in its notice of removal” because a removing party “is required only to provide in its removal notice ‘a short and plain statement of the grounds for removal.’ 28 U.S.C. § 1446(a).” Opposition at 3-4. Putting aside that CVS cites no case for the proposition that Section 1446(a) provides an exception to the duty of candor under Texas Disciplinary Rule 3.03 (or any other rule of ethics), CVS did not file a “short and plain statement for the grounds for removal.” Rather, CVS filed a 42 page brief replete with case law and statutory citations that, by deliberate omission, conveyed a false impression. Moreover, this omission on CVS’s part was particularly egregious because CVS was the unsuccessful party in the omitted cases and was represented by the same counsel. These are the precise circumstances that courts find “particularly disturbing” and warranting “[s]erious sanctions.” *Massey v. Prince George’s Cty.*, 907 F. Supp. 138, 142 (D. Md. 1995); *Matthews v. Kindred Healthcare, Inc.*, No. 05-1091-T-AN, 2005 WL 3542561, at *5 (W.D. Tenn. Dec. 17, 2005); *see also In re DePugh*, 409 B.R. 125, 143 (Bankr. S.D. Tex. 2009) (“It is unfathomable to this Court that counsel for Roundup's legal research turned up opinions from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits . . . but not the opinions from this Court or the District Court for the Southern District of Texas.”)

CVS’s only other argument is that five other judges in this district have granted motions to stay pending transfer to the Opiate MDL in Ohio, deferring any remand decision to the MDL court. CVS relies heavily on an opinion from Chief Judge Rosenthal who granted such a stay, noting the need to “reduce the risk of inconsistent results.” Opposition at 5. This, of course, is what makes CVS’s failure to cite its own adverse opinions so serious. **Every court that has addressed CVS’s**

request that the Court view their Motion as an invitation to consider whether CVS acted improperly by failing to disclose adverse authority and, if so, whether, CVS’s notice of removal can be properly relied upon.

jurisdictional argument – including the MDL Court – has rejected it. There are no “inconsistent rulings.” There is only a bad-faith argument that is being advanced for the purpose of creating procedural delay.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court strike CVS’s Notice of Removal in its entirety and to enter any other order the Court deems appropriate under the circumstances.

December 30, 2019

By: /s/ Warren T. Burns

Warren T. Burns (SBN 24053119)

Attorney-in-charge

SDTX Bar # 611613

BURNS CHAREST LLP

900 Jackson Street, Suite 500

Dallas, TX 75202

T: (469) 904-4550

F: (469) 444-5002

wburns@burnscharest.com

Darren Nicholson (SBN 24032789)

SDTX Bar #1561630

Will Thompson (SBN 24094981)

SDTX Bar # 2809145

BURNS CHAREST LLP

900 Jackson Street, Suite 500

Dallas, Texas 75202

Main: 469-904-4550

Fax: 469-444-5002

dnicholson@burnscharest.com

wthompson@burnscharest.com

Rick Yelton III (SBN 24113469)

Lydia A. Wright

BURNS CHAREST LLP

365 Canal Street, Suite 1170

New Orleans, LA 70130

Main: 504-799-2845

Fax: 504-881-1765

Ryelton@burnscharest.com

Lwright@burnscharest.com

Zona Jones (SBN 10887600)
**HARRISON DAVIS STEAKLEY
MORRISON JONES, P.C.**
850 Park Street
Beaumont, TX 77701
PH: (409) 753-0000
FAX: (409) 833-0075
Zona@TheTrialLawyers.com

Don Barrett*
BARRETT LAW GROUP, P.A.
404 Court Square North
Lexington, MS 39095-0927
Office: 662-834-9168
donbarrettpa@gmail.com

Jonathan W. Cuneo
Monica Miller
Mark H. Dubester
David L. Black
Jennifer E. Kelly
Evelyn Li
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue, NW, Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
jonc@cuneolaw.com
monica@cuneolaw.com
mark@cuneolaw.com
dblack@cuneolaw.com
jkelly@cuneolaw.com
evelyn@cuneolaw.com

Steve Martino
Ruth Lichtenfeld
TAYLOR MARTINO, P.C.
455 St. Louis Street
Mobile, AL 36602
Telephone: (251) 433-3131
stevemartino@taylormartino.com
ruth@taylormartino.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 2019, I caused the foregoing document to be filed with the Clerk of this Court via the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

Dated: December 30, 2019

/s/ Warren T. Burns
Warren T. Burns (SBN 24053119)
Attorney-in-charge
SDTX Bar # 611613
BURNS CHAREST LLP
900 Jackson Street, Suite 500
Dallas, TX 75202
T: (469) 904-4550
F: (469) 444-5002
wburns@burnscharest.com